

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF ALABAMA**

In re

Case No. 03-12442-DHW
Chapter 7

WYMAN ELLISON FRALEY
VICTORIA LYNN FRALEY,

Debtors.

MEMORANDUM OPINION

Five Star Credit Union (“Five Star”) filed a motion for relief from the automatic stay on January 26, 2004 to enforce its lien on a number of vehicles and equipment owned by the debtors.

The trustee, William C. Carn, III, filed an objection to the motion as to one piece of equipment, namely a 2002 John Deere tractor/backhoe.¹ A hearing on the motion was held March 10, 2004. The parties submitted the motion to the court for decision based on stipulations of fact and briefs of law. The court concludes that the interest of Five Star Credit Union in the tractor/backhoe is avoidable. Therefore, the objection is due to be sustained.

Jurisdiction

This court’s jurisdiction in this matter stems from 28 U.S.C. § 1334 and the United States District Court for the Middle District of Alabama’s general order of reference of title 11 matters to this court. Further, because this is a core proceeding under 28 U.S.C. § 157(b)(2)(G), the court’s jurisdiction extends to the entry of a final order and judgment.

Factual Findings

Five Star and the trustee filed a joint stipulation of facts (Docket entry

¹ Five Star’s motion has been granted as to all other property in which it claimed a perfected security interest (Docket entries 43 and 58). The trustee filed a motion to reconsider the order claiming that Five Star may not have a perfected security interest in a 1976 Air Stream Travel Trailer. However, the motion to reconsider has been withdrawn.

#81). A summary of the relevant facts follows.

On August 5, 2002, Five Star financed the debtors' purchase of a 2002 John Deere tractor/backhoe. The debtors gave Five Star an \$8,500 note and granted Five Star a security interest in the collateral. On August 13, 2002, Five Star perfected its security interest by filing a UCC Financing Statement with the Alabama Secretary of State. *See* Joint Stipulation of Facts, Exh. #1.

On July 25, 2003, Five Star filed with the Secretary of State an amended UCC Financing Statement. The amendment terminated Five Star's security interest in the John Deere tractor/backhoe. *See* Joint Stipulation of Facts, Exh. #9. Five Star apparently filed the termination statement in error.

Five Star filed a detinue action against the debtors in the Circuit Court of Houston County, Alabama (CV-03-816-J). Pursuant to that court's default order of possession, the court clerk issued a writ of seizure on October 2, 2003 with respect to the John Deere tractor/backhoe and other personalty in which Five Star claimed a security interest. *See* Joint Stipulation of Facts, Exh. # 10.

Five Star repossessed the John Deere tractor/backhoe and other property before the debtors filed the instant chapter 7 petition on October 22, 2003. *See* Joint Stipulation of Facts, ¶8.

Contentions of the Parties

Five Star contends that the John Deere tractor/backhoe is not property of the estate. Five Star points to the initially perfected security interest, the state court writ of seizure, and the prepetition repossession to support of its contention.

The trustee does not dispute Five Star's prepetition interest in the tractor/backhoe. The trustee contends, however, that Five Star's interest is avoidable. Specifically, the trustee contends that initial perfection of the security interest was terminated and that the prepetition writ of seizure/repossession is an avoidable transfer under 11 U.S.C. § 547.

Conclusions of Law

Therefore, although this matter is before the court on the creditor's motion for relief from the automatic stay, the central issue is whether Five Star's interest in the tractor/backhoe collateral is an avoidable preference. If the trustee can avoid Five Star's interest in the tractor/backhoe, the motion for relief from stay should be denied.

The trustee may avoid any transfer of an interest of the debtor in property (1) made for the benefit of a creditor (2) on account of an antecedent debt (3) while the debtor is insolvent (4) within 90 days of bankruptcy (5) which enables the creditor to receive more than the creditor would receive under chapter 7 had the transfer not been made.²

In the case *sub judice* the court is satisfied that all of the elements of an avoidable transfer are present. When Five Star filed the detinue action in state court, it did not have a perfected security interest in the tractor/backhoe. That security interest had been terminated on July 25, 2003 when the termination

² The exact text of the statute provides:

- (b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property—
- (1) to or for the benefit of a creditor;
 - (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
 - (3) made while the debtor was insolvent;
 - (4) made—
 - (A) on or within 90 days before the date of the filing of the petition; or
 - (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
 - (5) that enables such creditor to receive more than such creditor would receive if—
 - (A) the case were a case under chapter 7 of this title;
 - (B) the transfer had not been made; and
 - (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

statement was filed.³

Five Star subsequently took an interest in the collateral either through the state court's order⁴ or by its actual repossession of the collateral. The transfer to Five Star occurred within 90 days of the debtors' bankruptcy filing, was made on account of an antecedent debt while the debtors were insolvent,⁵ and enabled Five Star to receive more than it would have under chapter 7 had the transfer not been made.

Five Star advances a number of arguments in support of the proposition that its interest in the tractor/backhoe is not subject to avoidance. First, it contends that the state court's finding that it (Five Star) held a perfected security interest in the tractor/backhoe precludes further litigation of the issue and that this court is bound by that order.⁶ Five Star's argument is misplaced. This court is not bound under the doctrine of collateral estoppel by the state court's purported finding:

To successfully invoke collateral estoppel, a party must demonstrate that: (1) the issue at stake in a pending action is identical to the one involved in the prior litigation; (2) the issue must have been actually litigated in the prior suit; (3) the

³ *Ala. Code* 7-9A-513(d) (1975) provides:

(d) *Effect of filing termination statement.* Except as otherwise provided in section 7-9A-510, upon the filing of a termination statement with the filing office, the financing statement to which the termination statement relates ceases to be effective.

⁴ Five Star contends in brief that the state court made a finding that its security interest was perfected. This court has not been furnished with a copy of that order has only the clerk's writ of seizure among the exhibits to the joint stipulation of facts. *See* Joint Stipulation of Facts, Ex. 9.

⁵ Insolvency is presumed for the 90 days preceding bankruptcy. *See* 11 U.S.C. § 547(f).

⁶ In brief, Five Star asserts that the state court order "is entitled to full faith and credit and comity by the Bankruptcy Court." Further, as previously noted, the court has not been provided with a copy of the state court order.

determination of the issue in the prior litigation must have been a critical and necessary part of judgment in the action; and (4) the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding.

Barger v. City of Cartersville, 348 F.3d 1289, 1293 (11th Cir. 2003) (citing *Dixie Nat'l Life Ins. Co. v. McWhorter (In re McWhorter)*, 887 F.2d 1564 (11th Cir. 1989)). Here, there is no showing that the issue of Five Star's perfected security interest in the tractor/backhoe was actually litigated in the state court proceeding. Further, the trustee, the party against whom the state court decision is asserted, had no opportunity to litigate the issue in the earlier proceeding. Hence, this court is not collaterally estopped by the prior state court decision.

Five Star's argument, however, misses the mark in a more important way. The trustee is not specifically contesting the state court's determination that Five Star had an interest in the collateral. To the contrary he recognizes that there has been a transfer of an interest (effected either by the state court order or by Five Star's actual repossession) but maintains that the transfer is a voidable preference.

Next, Five Star contends that the transfer of a security interest in the collateral is unavoidable because the security interest was perfected within 20 days after the debtors received possession of the property. The relevant statute provides:

- (c) The trustee may not avoid under this section a transfer—
 - (3) that creates a security interest in property acquired by the debtor—
 - (A) to the extent such security interest secures new value that was—
 - (i) given at or after the signing of a security agreement that contains a description of such property as collateral;
 - (ii) given by or on behalf of the secured party under such agreement;
 - (iii) given to enable the debtor to acquire such property;
 - and

(iv) in fact used by the debtor to acquire such property; and
(B) that is perfected on or before 20 days after the debtor
receives possession of such property[.]

11 U.S.C. § 547(c)(3).

The court is not called upon here to decide whether Five Star properly perfected its security interest in the collateral at the time of the initial transaction. Nevertheless, assuming that it did, the security interest became unperfected when it was terminated on July 25, 2003. If the security interest was subsequently reperfected, either by the order of the state court or by actual possession, the subsequent perfection falls outside the scope of the § 547(c)(3) exception. That subsequent security interest was not for new value and was not perfected within 20 days after the debtors received possession of the property. In short, Five Star, which may have had an unavoidable security interest in the collateral prior to the filing of the termination statement, ignores the import of that termination with respect to its subsequent reperfecting.

Finally, Five Star relies on the authority of *Charles R. Hall Motors, Inc. v. Lewis (In re Lewis)*, 137 F.3d 1280 (11th Cir. 1998). It contends that because the tractor/backhoe was repossessed prepetition, the transfer is not avoidable by the trustee. This argument, too, is unpersuasive.

The *Lewis* court held that the defaulting debtor, whose vehicle was repossessed prior to the filing of the chapter 13 petition, did not retain any functional equivalent of ownership in the vehicle and that the bankruptcy estate's statutory right of redemption in the repossessed vehicle was insufficient to render the vehicle property of the estate. *Lewis*, 137 F.3d at 1283. Hence, the focus of the court in *In re Lewis* was whether property, repossessed but unsold prepetition, was property of the bankruptcy estate. Property of the estate is defined broadly to include "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1).

In a preference recovery action, however, a trustee concedes that the transferred property is not property of the estate because the property or an interest therein was transferred to another prior to the commencement of the case. This is the very essence of a trustee's avoidance powers under § 544, 547,

and 548 and why Five Star's *Lewis*-based argument is untenable.

For these reasons, the trustee's objection to Five Star's motion for relief from stay must be sustained. Pursuant to Fed. R. Bankr. Proc. 9021, an order consistent with this opinion will enter separately.

Done this 24th day of June, 2004.

A handwritten signature in black ink, appearing to read "Dwight H. Williams, Jr.", written in a cursive style.

Dwight H. Williams, Jr.
United States Bankruptcy Judge

c: Debtor

C. H. Espy, Jr., Attorney for Debtor
William C. Elliott, Attorney for Creditor
William C. Carn, III, Trustee